Supreme Court, U.S.
FILED

APR 23 2001

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(2)

No. 00-1182

In the Supreme Court of the United States

DAVID JON GOTCHNIK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 11 of the Treaty with the Chippewa of September 30, 1854, 10 Stat. 1111, which guarantees members of the Bois Forte Band of Chippewa Indians the right to hunt and fish in the Boundary Waters Canoe Area Wilderness, excuses members of that Band from complying with federal restrictions on the use of motorized vehicles in the Boundary Waters Canoe Area Wilderness, see 36 C.F.R. 261.16(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

DeCoteau v. *District County Court*, 420 U.S. 425 (1975)	7
Grand Traverse Band v. *Director, Mich. Dep't of Natural Res.*, 141 F.3d 635 (6th Cir.), cert. denied, 525 U.S. 1040 (1998)	10
Jones v. *Meehan*, 175 U.S. 1 (1899)	6
Kolovrat v. *Oregon*, 366 U.S. 187 (1961)	9
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982)	6
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)	4, 7, 9
Moore v. *United States*, 429 U.S. 20 (1976)	9
United States v. *Bresette*, 761 F. Supp. 658 (D. Minn. 1991)	2
United States v. *Choctaw Nation*, 179 U.S. 494 (1900)	7
United States v. *Dion*, 476 U.S. 734 (1986)	9

Treaty, statutes and regulation:

Treaty with the Chippewa of Sept. 30, 1854, 10 Stat. 1109	2
Art. 11, 10 Stat. 1111	2, 3, 5
Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649	2
§ 2(1), 92 Stat. 1649	2
§ 4, 92 Stat. 1650-1652	3

Statutes and regulation—Continued: Page

§ 17, 92 Stat. 1658 2
Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 2
16 U.S.C. 551 3
16 U.S.C. 1133(c) 3
36 C.F.R.:
Section 261.16 4
Section 261.16(a) 3, 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 222 F.3d 506. The opinion of the district court (Pet. App. A16-A32) is reported at 57 F. Supp. 2d 798.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2000. A petition for rehearing was denied on October 10, 2000 (Pet. App. A33). The petition for a writ of certiorari was filed on January 8, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Treaty with the Chippewa of September 30, 1854, 10 Stat. 1109, various Chippewa Bands ceded to the United States a large tract of land in northern Minnesota, in exchange for which the United States reserved other land for the Chippewa, made monetary payments, and guaranteed them certain rights. Article 11 provides that the Chippewa "shall have the right to hunt and fish [on the ceded land], until otherwise ordered by the President." 10 Stat. 1111. That provision has been held to establish "usufructuary rights—the right to make a modest living by hunting and gathering off the land." *United States* v. *Bresette*, 761 F. Supp. 658, 660 (D. Minn. 1991) (reviewing case law).

In 1964, Congress enacted the Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890, which designates as wilderness the Boundary Waters Canoe Area Wilderness (Boundary Waters Wilderness). The Boundary Waters Wilderness consists of a portion of the area ceded by the Chippewa under the 1854 Treaty. Pet. App. A17.

In 1978, Congress enacted the Boundary Waters Canoe Area Wilderness Act (Boundary Waters Act), Pub. L. No. 95-495, 92 Stat. 1649, which expanded the Boundary Waters Wilderness. The Boundary Waters Act was designed to "provide for the protection and management of the fish and wildlife of the wilderness so as to enhance public enjoyment and appreciation of the unique biotic resources of the region." § 2(1), 92 Stat. 1649. Congress specified that "[n]othing in this Act shall affect the provisions of any treaty now applicable to lands and waters that are included in the * * * wilderness." § 17, 92 Stat. 1658.

Under the Wilderness Act and regulations adopted by the Secretary of Agriculture to administer the Act, the use of motorboats and other motorized vehicles is generally prohibited in wilderness areas. 16 U.S.C. 1133(c); 36 C.F.R. 261.16(a). The Boundary Waters Act modifies that prohibition, allowing the use of snowmobiles and motorboats in specified areas of the Boundary Waters Wilderness. § 4, 92 Stat. 1650-1652. The use of motorized vehicles outside those areas is a misdemeanor punishable by a maximum fine of $500 and a maximum term of imprisonment of six months. 16 U.S.C. 551.

2. Petitioners are members of the Bois Forte Band of Chippewa Indians, which was a signatory to the 1854 Treaty. In 1998 and 1999, petitioners were cited for violating 36 C.F.R. 261.16(a) by using motorized vehicles in areas of the Boundary Waters Wilderness where such vehicles are prohibited. Petitioners David Jon Gotchnik, Terry Anderson, and Thomas Anderson were cited for using boats equipped with outboard motors, while petitioner Francis Stepec was cited for driving an all-terrain vehicle across a frozen lake. Pet. App. A18.[1]

a. Petitioners moved for judgments of acquittal. They argued that Article 11 of the 1854 Treaty should be read to protect the Chippewa's right to gain access to hunting and fishing grounds, including through the use of motorized vehicles.

The district court denied the motions. Pet. App. A16-A32. The court found that hunting and fishing in the

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[1] In addition, Stepec was cited for possessing a motorized ice augur in an area in which motorized vehicles are prohibited. That citation was dismissed by the district court, Pet. App. A31, and the United States did not appeal.

Boundary Waters Wilderness does not require access by motorized vehicles, noting that more than 100,000 people fish there annually while complying with the restrictions on motorized vehicles. *Id.* at A25. The court found no evidence to suggest that the signatories to the 1854 Treaty would have understood the right to hunt and fish in the ceded lands to encompass an unrestricted right to travel to and from those lands by "the most advanced technological means." *Ibid.* The court thus found that the prohibition on motorized vehicles "does nothing to diminish the extent of the rights held by the Chippewa at the time the Treaty was signed." *Ibid.*

In the alternative, the district court concluded that, even if the prohibition on motorized vehicles could be seen as a restriction on petitioners' hunting and fishing rights, such a restriction was a nondiscriminatory conservation measure, and thus permissible notwithstanding the 1854 Treaty. Pet. App. A26. The court relied on this Court's decisions "reaffirm[ing] state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing and gathering rights in the interest of conservation." *Ibid.* (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999)).

Petitioners were found guilty of violating 36 C.F.R. 261.16 and were sentenced to fines ranging from $150 to $300.

b. The court of appeals affirmed. Pet. App. A1-A15.

The court of appeals construed the 1854 Treaty as not recognizing any unrestricted right of access to hunting and fishing grounds by any mode of transportation that a tribal member might choose. The court reasoned that "[a] motorboat, all-terrain vehicle, or helicopter for that matter, may make it easier to reach a preferred fishing

or hunting spot within the Boundary Waters Area, but the use of such motorized conveyances is not part and parcel of the protected act of hunting or fishing." Pet. App. A10. The court found that the restrictions on the use of motorized vehicles do not impose a restriction on petitioners' hunting and fishing rights, as petitioners "have precisely the same access to all parts of the Boundary Waters Area that the Bands had at the time the treaty was signed." *Id.* at A13. Furthermore, the court found that hunting and fishing in the Boundary Waters Wilderness does not require the use of motorized vehicles, as demonstrated by the fact that thousands of people fish in the area each year in compliance with the restrictions on motorized vehicles. *Id.* at A14.[2]

ARGUMENT

Petitioners contend that the court of appeals erred in holding that the right to hunt and fish protected under Article 11 of the 1854 Treaty does not include a right to gain access to all parts of the Boundary Waters Wilderness through the use of motorized vehicles. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review, therefore, is unwarranted.

1. The principles governing the construction of Indian treaties are well established. Indian treaties must be "construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by

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[2] The court of appeals, having concluded that the restrictions on motorized vehicles are consistent with the 1854 Treaty, did not reach the question whether those restrictions constitute reasonable and necessary conservation measures applicable to the exercise of treaty rights. See Pet. App. A15.

the Indians." *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899). Any ambiguities in a treaty must be liberally construed in favor of the Indian Tribe. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982).

The court of appeals' construction of the 1854 Treaty is fully consistent with those principles. The court explicitly recognized its obligation to "give effect to the terms of the Treaty as the Indian signatories themselves would have understood them" and to "construe any ambiguous term in favor of tribal interests." Pet. App. A8. Applying those rules of construction, the court concluded that the right to hunt and fish protected in the 1854 Treaty does not encompass an unfettered right to use any means of transportation to reach protected hunting and fishing grounds. See *id.* at A9-A10. In support of that conclusion, the court looked to the construction given to similar treaty provisions guaranteeing hunting and fishing rights, which have been held not to confine tribal members to the use of hunting and fishing implements existing at the time that the treaty was signed. The court recognized the distinction between hunting and fishing themselves, which are expressly protected by the 1854 Treaty, and transportation to the hunting and fishing grounds, which is not mentioned in the Treaty. Thus, the court concluded that the use of motorized vehicles is "not part and parcel of the protected act of hunting or fishing." *Id.* at A10.

a. Petitioners erroneously assert (Pet. 6-11) that the court of appeals failed to examine historical evidence of the intent of the signatories to the 1854 Treaty, and thereby failed to apply the principles established by this Court for the construction of Indian treaties. In the first place, although the Court has examined historical evidence to gain "insight into how the parties

to the Treaty understood the terms of the agreement," *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), the Court has not held that the construction of Indian treaties requires resort to historical evidence in all circumstances. Rather, the Court has recognized that, when the terms of the treaty have a plain and unambiguous meaning, a court must effectuate that meaning. See *United States* v. *Choctaw Nation*, 179 U.S. 494, 535 (1900); see also *DeCoteau* v. *District County Court*, 420 U.S. 425, 447 (1975) ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.").

In any event, the court of appeals *did* examine the record to ascertain whether it contained any historical evidence that the signatories understood the 1854 Treaty to encompass a right of access to hunting and fishing grounds by modern means of transportation. But the court concluded that petitioners "presented no evidence, historical or otherwise, to suggest that the signatories adhered to" such an understanding. Pet. App. A11. Indeed, petitioners do not point to *any* historical evidence in the record—much less evidence that the court supposedly disregarded—concerning the signatories' contemporaneous understanding of the 1854 Treaty. See Pet. 8 (identifying only evidence concerning "the system of tribal regulation in place since 1988"). Rather, petitioners contend (Pet. 8-11), incorrectly, that the United States had an obligation to present historical evidence establishing that the signatories understood the Treaty in accordance with its plain language. See p. 9, *infra*.

b. Petitioners argue (Pet. 9) that the court of appeals' decision is "inconsistent with the reasoning in numerous other federal cases," mostly district court cases, that concern whether a treaty right to hunt or

fish encompasses the right to hunt or fish using modern implements. As the court of appeals explained, however, there is a crucial "distinction between [tribal members'] use of evolving hunting and fishing implements and their use of modern means of transportation." Pet. App. A9. That is because "[t]he use of modern gaming instruments and techniques goes to the very essence of th[e] protected activities [*i.e.*, hunting and fishing], whereas the use of the most advanced means of transportation to reach desired hunting and fishing areas is merely peripheral to them." *Id.* at A10. There is thus no "inconsisten[cy]" between the court of appeals' decision in this case and the decisions of other courts recognizing tribal members' right to hunt and fish using modern implements. Indeed, the United States acknowledged in this case that the 1854 Treaty "protects [petitioners'] right to use modern hunting and fishing techniques." *Id.* at A9.

c. Petitioners further contend (Pet. 11-13) that the court of appeals contravened the principles governing the construction of Indian treaties by considering Congress's understanding of the 1854 Treaty at the time of its enactment of the Boundary Waters Act in 1978. The court of appeals made clear, however, that "Congress's understanding of the Treaty [in 1978] cannot be substituted for that of the signatory Bands." Pet. App. A11. The court simply found confirmation for its own construction of the 1854 Treaty, which was based on the plain meaning of its terms and the absence of contradictory historical evidence, in Congress's understanding that the restrictions on the use of motorized vehicles in the Boundary Waters Wilderness do not violate the Treaty. See *id.* at A9-A11.

2. Petitioners also argue (Pet. 14-15) that the court of appeals incorrectly shifted an evidentiary burden to

defendants in a criminal case. This Court has repeatedly articulated the "elementary proposition that the prosecution [bears] the burden of proving beyond a reasonable doubt every element of the charged offense." *Moore* v. *United States*, 429 U.S. 20, 22 (1976). The United States satisfied that burden here by proving that petitioners operated motorized vehicles in a wilderness area, in violation of the Boundary Waters Act and 36 C.F.R. 261.16(a). The United States did not bear an *evidentiary* burden to establish the meaning of the 1854 Treaty, because treaty interpretation is a legal question properly resolved by the courts. See, *e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961) ("courts interpret treaties for themselves"). Rather than place an evidentiary burden on petitioners, the court of appeals simply found unpersuasive petitioners' legal arguments regarding the meaning of the Treaty.

3. Finally, petitioners contend (Pet. 15-19) that the court of appeals erred in failing to require a clear expression of congressional intent in the Boundary Waters Act to restrict tribal hunting and fishing rights. While this Court has held that the abrogation of treaty rights requires a clear expression of congressional intent, see, *e.g.*, *United States* v. *Dion*, 476 U.S. 734, 739-740 (1986), this case does not involve any abrogation of treaty rights. The 1854 Treaty does not encompass a right to use motorized vehicles in the Boundary Waters Wilderness.[3]

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[3] Moreover, this Court has held that the exercise of treaty-based hunting and fishing rights may be subject to conservation regulations, even without a showing of clear congressional intent, when such regulations are shown to be reasonable, nondiscriminatory, and necessary. See *Mille Lacs*, 526 U.S. at 205. The restrictions on the use of motorized vehicles in portions of the Boundary Waters Wilderness plainly satisfy that standard.

Petitioners have not shown that the restrictions on the use of motorized vehicles conflict with their treaty-based hunting and fishing rights. They remain free to hunt and fish in the Boundary Waters Wilderness and to use modern hunting and fishing implements in doing so. They do not claim that they cannot hunt or fish in the Boundary Waters Wilderness unless they have access by motorized vehicles; indeed, the courts below found that thousands of people annually engage in activities such as fishing in the Boundary Waters Wilderness while complying with the motorized vehicle restrictions. See Pet. App. A14, A25; cf. *Grand Traverse Band* v. *Director, Mich. Dep't of Natural Res.*, 141 F.3d 635 (6th Cir.) (tribal reserved fishing right encompasses right to moor commercial vessels at public marina because such mooring was necessary to gain access to treaty fishing areas), cert. denied, 525 U.S. 1040 (1998). Petitioners thus present no rationale for overturning the court of appeals' conclusion that the 1854 Treaty does not guarantee an unrestricted right to gain access to the Boundary Waters Wilderness by any particular mode of transportation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2001